Supreme Court, U.S.
FILED
96 468 SEP 13 1996
OFFICE OF THE CLERK

No. 96-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

CARL HELTON, CHARLES W. KEMPTON, NICK PAYNE, JAMES E. TAYLOR, BOB WILLIAMS, DAVID JACK WRIGHT, ET AL.,

Cross-Petitioners,

v.

K MART CORPORATION,

Cross-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Age Discrimination in Employment Act (the "ADEA") incorporates Section 256 of the Fair Labor Standards Act, 29 U.S.C. § 256, for purposes of determining when an action is commenced on behalf of opt-in plaintiffs?

2. Whether the "single filing," or "piggybacking," rule (which permits a plaintiff to assert an ADEA claim without first having filed a charge of discrimination with the Equal Employment Opportunity Commission) allows a plaintiff to "piggyback" on charges filed by persons other than original plaintiffs in the same case?

LIST OF PARTIES

The following parties were Plaintiffs below and are Respondents and Cross-Petitioners before this Court:

Original Plaintiffs: Carl Helton, Charles W. Kempton, Nick Payne, James E. Taylor, and Bob Williams.

Intervenors and Opt-Ins: David Jack Wright, Mike Williams, Larry Good, Robert Windell, Robert Defoe, Robert Ennis, Edna Portilla, Roger Icenhour, Richard Allen Morris, Meredith T. Watkins, Stephen R. Freeman, Terry E. Dahl, Tony M. Arrington, Kenneth C. Bell, Ronald L. Braley, Mercer David Grayson, Edward J. Kondrad, James T. Mixon, David L. Navickas, Ricky D. Sallee, James L. Steadman, and John D. Thompson.

The following party was a Defendant below and is a Petitioner and Cross-Respondent before this Court:

K Mart Corporation.

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The opinion of the court of appeals is published at 79 F.3d 1086. The opinion of the district court is reproduced as an appendix to the court of appeals' published opinion.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1996. The court of appeals denied Kmart's motion for rehearing and both parties' separate suggestions of rehearing en banc on June 17, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Kmart filed a petition for certiorari on July 18, 1996. The Respondents/Cross-Petitioners filed a brief in opposition to that petition on August 12, 1996. The Respondents/Cross-Petitioners incorporate by reference the appendix contained in Kmart's petition.

STATUTES INVOLVED

1. 29 U.S.C. § 255(a):

> Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healy Act, or the Bacon-Davis Act--
>
> (a) if the cause of action accrues on or after May 14, 1947--may be commenced within two years after the

> cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;

2. 29 U.S.C. § 256:

In determining when an action is commenced for the purposes of section 255 of this title, an action commenced on or after May 14, 1947 under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], the Walsh-Healey Act [41 U.S.C.A. § 35 et seq.], shall be considered to be commenced on the date when the complaint is filed; except that in the case of a collective or class action instituted under the Fair Labor Standards Act of 1938, as amended, or the Bacon-Davis Act, it shall be considered to be commenced in the case of any individual claimant—

> (a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or
>
> (b) if such written consent was not so filed or if his name did not so appear — on the subsequent date on which such written consent is filed in the court in which the action was commenced.

3. 29 U.S.C. § 626(d):

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed--
>
> (1) within 180 days after the alleged unlawful practice occurred; or
>
> (2) in a case to which section 633(b) of this titles applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

4. [Former] 29 U.S.C. § 626(e)(1):

> Sections 255 and 259 of this title shall apply to actions under this chapter.

STATEMENT OF THE CASE

Kmart Corporation v. Grayson, et al. (the "*Grayson*" case) and *Kmart Corporation v. Helton, et al.* (the "*Helton*" case) were originally two multi-plaintiff actions brought under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.* (the "ADEA"). The complaints in both cases allege that the plaintiffs were victims of an age-motivated purge of Store Managers in Kmart's Southern Region that began in 1990, following a company-wide reorganization and the installation of a new Vice President of Kmart's Southern

Region.[1] The eleven original *Grayson* plaintiffs filed their complaint on January 17, 1992. The five original *Helton* plaintiffs filed their complaint on October 29, 1992.

On February 28, 1994, the *Helton* plaintiffs moved to amend their complaint to specify that the action was brought, under 29 U.S.C. § 216(b),[2] on behalf of the both named plaintiffs and others "similarly situated." The plaintiffs asked the district court to allow additional plaintiffs to "opt in" to the case if they fell within the proposed "class" definition:

> Each person who (1) was demoted from the position of General Store Manager of any store in Kmart's Southern Region at any time between January 1, 1990 and December 31, 1992, or who resigned from such a position during the same time period after being told that he or she would be demoted if he or she did not resign, and (2) was, at the time of the demotion or resignation, at least 40 years old.

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[1] Between 1990 and 1992, Kmart demoted approximately 151 Southern Region Store Managers and approximately 76 more resigned. This purge eliminated approximately one-third of all Store Managers in the Southern Region.

[2] Section 216(b) provides that:

> An action to recover the liability prescribed . . . may be maintained in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

The plaintiffs also asked the district court to order that notices be sent to all of the members of this class, informing them of their right to opt in as plaintiffs. *See Hoffman-LaRoche, Inc. v. Sperling*, 493 U.S. 165 (1989)(district court has discretion under ADEA to facilitate notice to potential opt-in plaintiffs).

The district court granted this motion in an order entered July 21, 1994. The eleven *Grayson* plaintiffs and ten other demoted Kmart Store Managers promptly filed notices opting in to the *Helton* case. The district court then certified its July 21 order for interlocutory appeal and the court of appeals granted leave to pursue the interlocutory appeal.[3]

The court of appeals affirmed Judge Shoob's class order, holding that "the plaintiffs have made substantial allegations and provided evidentiary support for their contention that they were victims of an age-motivated purge in K Mart's Southern Region from 1990 to 1992." *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1097 (11th Cir. 1996).

At the same time, the court of appeals severely restricted the "temporal scope" of the opt-in class, based on the court's application of two limitations provisions governing the claims of opt-in plaintiffs. These were, *first*, the 3- year statute of limitations applicable to ADEA claims arising before November 21, 1991, and *second*, the 180- (or 300-) day charge filing requirement generally applicable to ADEA claims.

First, the court of appeals held that the ADEA implicitly incorporates Section 256 of the Fair Labor Standards Act, 29

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[3] While the appeal was pending, the Equal Employment Opportunity Commission sought and obtained permission from Judge Shoob to intervene in the *Helton* case under 29 U.S.C. § 626(b).

U.S.C. § 256.[4] Section 256 provides that FLSA actions are deemed commenced only when each individual plaintiff is either named in the complaint or files a written consent to become a party plaintiff. This ruling barred as untimely every opt-in notice that had been filed by a plaintiff subject to the 3-year limitations period. It also rendered pointless any efforts to notify (under *Sperling*) other potential plaintiffs demoted before November 21, 1991, as future opt-ins would of necessity be untimely.

Second, the court of appeals drastically limited the "single filing," or "piggybacking," rule. The rule permits class members to opt in as plaintiffs without having filed their own EEOC charges, by relying upon EEOC charges filed by others. The court of appeals held that opt-in plaintiffs could piggyback only on charges filed by original *Helton* plaintiffs. The court held that the earliest such charge had been filed by plaintiff Wayne Kempton on April 15, 1992. This ruling limited the "temporal scope" of the opt-in class to persons who had been demoted within 180 days prior to April 15, 1992 (or 300 days in deferral states).

On June 17, 1996, the Eleventh Circuit denied Kmart's motion for rehearing and both parties' separate suggestions of rehearing en banc. Kmart filed a petition for certiorari, which the plaintiffs have opposed. This conditional cross-petition is filed within 90 days of the Eleventh Circuit's order denying the motion for reconsideration. *See* Supreme Court Rule 13.

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[4] Section 256 codifies § 7 of the Portal-to-Portal Act.

REASONS FOR GRANTING THE WRIT

1. If Kmart's Petition Is Granted, This Court Should Resolve the Split Among the Circuits as to Whether the ADEA Incorporates § 256 of the FLSA.

The claims of ADEA plaintiffs demoted before November 21, 1991[5] are subject to the FLSA's 3-year statute of limitations. *See* 29 U.S.C. § 626(e), *incorporating* 29 U.S.C. § 255. For the original *Helton* plaintiffs, of course, the statute was satisfied, or tolled, by the filing of their complaint. The parties disputed, however, what action must occur in order to toll the statute for "opt-in" plaintiffs.

The court of appeals held that the ADEA incorporated 29 U.S.C. § 256, so that the limitations period applicable to each opt-in plaintiff's claim was not tolled until he filed an individual opt-in notice. The court conceded that § 256 was not expressly incorporated in the ADEA. Relying on *O'Connell v. Champion International Corp.*, 812 F.2d 393 (8th Cir. 1987), however, the court held that the ADEA implicitly incorporates § 256. 79 F.3d at 1105-07.

The court of appeals' decision directly conflicts with the rulings of two other circuits and the overwhelming majority of district courts to have faced the issue. These courts have reasoned that Congress' express incorporation of specific other portions of the FLSA should exclude implied incorporation of

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[5] The Civil Rights Act of 1991, which became effective November 21, 1991, substituted a requirement that the charging party file suit within 90 days of receiving notice that the EEOC had terminated its investigation of the plaintiff's charge. 29 U.S.C. § 626(e)(1991).

§ 256. *Sperling v. Hoffman-LaRoche, Inc.*, 24 F.3d 363, 468-71 (3d Cir. 1994); *Morelock v. NCR Corp.*, 586 F.2d 1096, 1103 (6th Cir. 1978)("Section 256 is not incorporated by reference into the ADEA and therefore we fail to see how it could be applicable to age discrimination suits."), *cert. denied*, 441 U.S. 906 (1979); *In Re Western District Xerox Litigation*, 850 F. Supp. 1079, 1093 (W.D.N.Y. 1994)("[T]olling commences for statute of limitations purposes for subsequently filed complaints, when the initial class action complaint was filed and not when class members opted into the certified class."); *Mooney v. Aramco Services Co.*, 764 F. Supp. 461, 462 (S.D. Tex. 1991)("The application of § 256 is refuted by the clear language of the ADEA."); *Levine v. Bryant*, 700 F. Supp. 949, 953 (N.D. Ill. 1988)("Congress did not intend for section 256 to apply to the ADEA."); *Vivone v. ACME Markets, Inc.*, 687 F. Supp. 168, 169 (E.D. Pa. 1988)("29 U.S.C. is not among the sections of the FLSA incorporated into the ADEA.") . *See also Sperling v Hoffmann-La Roche, Inc.*, 145 F.R.D. 357, 360-61 (D.N.J. 1992)(same).

Virtually all of the decisions rejecting implied incorporation of § 256 include, in support of their conclusion, this Court's admonition that Congress selectively incorporated only certain provisions of the FLSA into the ADEA:

> [I]n enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation.

Lorillard v. Pons, 434 U.S. 575, 581 (1978).

Implied incorporation of § 256 would also be incompatible with this Court's decision in *Hoffman-LaRoche, Inc. v. Sperling*, 493 U.S. 165 (1989). *Sperling* approved a class notification process under which plaintiffs subject to the 3-year limitations period were permitted to file opt-in notices *more* than 3 years after the alleged discriminatory acts occurred.

In *Sperling*, the original plaintiffs had filed a complaint on behalf of themselves and a class of several hundred other employees who had been discharged or demoted in a 1985 reduction in force. The district court directed the employer to provide a list of names and addresses of potential class members. The members were to receive court-approved notices, informing them of the existence of the suit and their right to join as plaintiffs. In an interlocutory appeal (taken before the notices were actually sent), this Court approved the procedure. It reasoned:

> Congress has stated its policy that ADEA plaintiffs should have the opportunity to proceed collectively. A collective action allows age discrimination plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources. . . .
>
> These benefits, however, depend on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate.

493 U.S. at 170.

Among the advantages of a court-managed notification process was the ability to set "cutoff dates" for opt-ins:

> Court authorization of notice serves the legitimate goal of avoiding a multiplicity of duplicative suits and setting cutoff dates to expedite disposition of the action.

493 U.S. at 172.

Sperling was decided in 1989, some four years after the 1985 reduction in force. The notices had not yet been mailed to the class members. If the class members needed to have filed opt-in notices within three years of the alleged discrimination, the very notification process *Sperling* approved would have been meaningless, for by 1989 there would have been no viable claims left to assert via the opt-in process. There would have been no reason to speak of future "cutoff dates," 493 U.S. at 172.

It is hardly surprising that the Third Circuit, when the issue subsequently arose in *Sperling*, refused to follow the *O'Connell* rule and held that the filing of the class complaint tolled the statute for the entire class. *Sperling v. Hoffman-LaRoche, Inc.*, 24 F.3d 363 (3d Cir. 1994). Indeed, it is hard to imagine how a district court could *ever* assure the completion of a class notification process within three years of the alleged discriminatory activity. If such a notification process is to be (a) meaningful and (b) orderly, it cannot occur while a statute of limitations is ticking away.

The circuit courts have split on the incorporation issue.[6] The Eleventh Circuit's decision overlooks the pronouncements of this Court and conflicts with the overwhelming majority of decisions by the lower courts. If Kmart's petition is granted, the Court should also take up the incorporation issue.

2. If Kmart's Petition Is Granted, This Court Should Resolve the Split Among the Circuits as to Whether an ADEA Plaintiff May "Piggyback" on Charges Filed by Persons Other than Original Plaintiffs in the Same Case.

The "single filing," or "piggybacking," rule allows a plaintiff to pursue a Title VII or ADEA action in court without first having filed a charge of discrimination with the EEOC.[7] The rule allows a plaintiff to rely ("piggyback") on a charge filed by someone else, where that charge alleges similar illegal activity. As the Sixth Circuit has recently noted, the *basic* rule is uncontroversial:

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[6] The contrast between the Eighth Circuit's 1987 *O'Connell* decision and the Third Circuit's 1994 *Sperling* decision can be viewed either as a split in the circuits or as an evolution of the law following this Court's 1989 *Sperling* ruling. The Eleventh Circuit's ruling either creates or deepens the division of authority.

[7] The ADEA normally requires an aggrieved individual to file an EEOC charge as a precondition to filing suit. 29 U.S.C. § 626(d).

> [T]he federal courts to address the issue have uniformly held that the [single filing] rule is applicable in the ADEA context. . . .

Howlett v. Holiday Inns, Inc., 49 F.3d 189, 194 (6th Cir. 1995).

In interpreting the single filing rule, the courts have looked to the underlying purpose of the charge filing requirement. The EEOC charge gives the employer notice of potential claims against it and affords the EEOC an opportunity to conciliate those claims. A charge that contains allegations of discrimination against a class of employees accomplishes this purpose for the entire class. Once notice has been given on behalf of the class, there is no reason to require each member to file a separate, duplicative, charge. The court of appeals acknowledged precisely this tenet:

> The purpose of the requirement that a plaintiff file an EEOC charge within 180 days (or 300 days in a deferral state) of the allegedly illegal act or practice is (1) to give the employer prompt notice of the complaint against it, and (2) to give the EEOC sufficient time to attempt the conciliation process before a civil action is filed. *Larkin v. Pullman-Standard Div., Pullman, Inc.*, 854 F.2d 1549, 1562-65 (11th Cir. 1988), *vacated on other grounds sub nom, Swint v. Pullman-Standard*, 493 U.S. 929, 110 S. Ct. 316, 107 L. Ed.2d 307 (1989). The principle behind the piggybacking rule is to give effect to the remedial purposes of the ADEA and to not exclude otherwise suitable plaintiffs from an ADEA class action simply because they have not performed the "useless act of filing a

> charge." *See* Larson, *Employment Discrimination* § 102.35(b) at 21-276.29— 21-276.30. *See Mooney v. Aramco Serv. Co.*, 54 F.3d 1207, 1223 (5th Cir. 1995) ("'It would be wasteful, if not vain for numerous employees, all with the same grievance, to have to process many identical complaints with the EEOC.'") (quoting *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1968)).

79 F.3d at 1102-03.

After stating this rule, however, the court of appeals then appended an illogical and overly technical corollary: it held that only a charge filed by an original plaintiff in the same case could be used for piggybacking.[8]

The court of appeals' ruling directly contradicts a decision by the Second Circuit, allowing an ADEA plaintiff to piggyback on a charge filed by a plaintiff in a *different* action. *Tolliver v. Xerox Corp.*, 918 F.2d 1052 (2d Cir. 1990). The Second Circuit reasoned:

> The further question is whether the single filing rule may be used to permit an ADEA plaintiff to file his or her own lawsuit, rather than to join in a previously filed suit, either as co-plaintiff or intervenor. If the single filing rule is to be available in non-class ADEA actions, we see no reason to limit its use to

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[8] This had the effect of excluding potential opt-in plaintiffs who were part of the 1990-92 purge, but did not happen to have been demoted within 180 or 300 days of a charge filed by an original *Helton* plaintiff.

> those electing to join preexisting lawsuits. The purpose of the charge filing requirement is fully served by an administrative claim that alerts the EEOC to the nature and scope of the grievance, regardless of whether those with a similar grievance elect to join a preexisting suit or initiate their own.

918 F.2d at 1057.

The Second Circuit was correct. The purpose of the charge is to afford notice and an opportunity to conciliate; that is accomplished *at the time the class charge is filed*. The charging party might end up in another civil action, might settle his case, or might never file suit at all. At best, these outcomes are random, and ought to be irrelevant to the question of whether the charge has accomplished its purpose. At worst, the power to control these outcomes allows an employer, a single charging party, or both to manipulate the fate of an entire class.[9]

The court of appeals' decision cannot be reconciled with the rationale of the single filing rule, particularly as it has been expressed in recent decisions by other circuits. *Mooney v. Aramco Services Co.*, 54 F.3d 1207, 1223 (5th Cir. 1995); *Howlett v. Holiday Inns, Inc.* 49 F.3d 189, 194-96 (6th Cir. 1995). The split among the circuits is deepened by a Third Circuit decision rejecting *Tolliver* and holding that the single filing rule may be invoked in § 216(b) class actions, but not in

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[9] The employer can avoid the claims of hundreds or thousands of class members by settling with the charging party; all that is necessary is to settle early enough so that the charging party never becomes an "original plaintiff."

other ADEA cases. *Whalen v. W.R. Grace & Co.*, 56 F.3d 504, 506-07 (3d Cir. 1995).

There clearly is discord among the circuits, and this case affords the Court an excellent opportunity to establish parameters of the single filing rule. *See Howlett*, 49 F.3d at 194 ("Controversy arises, though, over the test to use in determining whether an administrative charge will suffice to support piggybacking."). These issues are likely to presented repeatedly in class actions and other multi-plaintiff cases brought under the Federal employment discrimination laws.

CONCLUSION

If Kmart's petition for a writ of certiorari is granted, the cross-petition for a writ of certiorari should also be granted.

Respectfully submitted,

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(2)

Supreme Court, U.S.
FILED
OCT 10 1996
CLERK

No. 96-468

In The

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October Term, 1996

CARL HELTON, CHARLES W. KEMPTON, NICK PAYNE, JAMES E. TAYLOR, BOB WILLIAMS, AND DAVID JACK WRIGHT,

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v.

K MART CORPORATION,

Cross-Respondent.

On Conditional Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER/CROSS-RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the tolling rule applicable to class actions brought pursuant to Fed.R.Civ.P. 23 or the statutory tolling rule in Section 256 of the Fair Labor Standards Act, 29 U.S.C. § 256 (1994), should govern the tolling of the period of limitations for opt-in claims in a class action brought under the Age Discrimination in Employment Act ("ADEA")?

2. Whether the temporal scope of an ADEA class should be measured by the timely charge of a named plaintiff in the lawsuit or by a charge filed by a putative class member whose own, opt-in claim is time barred?

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INTRODUCTION

Petitioner/Cross-Respondent K Mart Corporation ("K Mart") has previously filed its Petition for Writ of Certiorari to review the judgment and decision of the United States Court of Appeals for the Eleventh Circuit, filed April 9, 1996, which petition has been docketed as Case No. 96-98. Respondents in that action have filed a "conditional cross-petition", which K Mart respectfully submits highlights the reasons why K Mart's petition should be granted.

OPINIONS BELOW

The decision of the Court of Appeals for the Eleventh Circuit is published at 79 F.3d 1086 and is reprinted in the appendix accompanying K Mart's petition in Case No. 96-98, which is incorporated by reference. The unpublished, June 29, 1994 opinion of the United States District Court for the Northern District of Georgia also is reprinted in the appendix to the petition filed in Case No. 96-98.

JURISDICTION

Both K Mart and Respondents/Cross-Petitioners have invoked the jurisdiction of this Court pursuant to 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

1. Course of Proceedings and Disposition Below

The procedural history of this case has been described in detail in K Mart's Petition for Writ of Certiorari in Case No. 96-98 and in the underlying decision of the court of appeals and need not be restated herein in detail. In brief, K Mart's petition and respondents' cross-petition arise out of two, multi-plaintiff age discrimination lawsuits filed in the United States District Court of the Northern District of Georgia in 1992. After completion of discovery in the first-filed action, the Honorable Julie E. Carnes issued an Order holding that the eleven demotion claims at issue had not been properly joined and should be severed for separate proceedings. *Grayson v. K Mart Corp.*, 849 F. Supp. 785 (N.D. Ga. 1994).[1] Approximately six months later, the Honorable Marvin H. Shoob allowed five plaintiffs in the second lawsuit, which had been filed some ten months after the *Grayson* case, to amend the Complaint to convert their lawsuit to an "opt-in" class action pursuant to 29 U.S.C. § 216(b) (1994). *Helton v. K Mart Corp.*, Civ. No. 1:92-CV-2564-MHS (N.D. Ga. July 21, 1994). Shortly thereafter, Judge Carnes entered a conditional, *sua sponte* order allowing the six former *Grayson* plaintiffs remaining in her court to opt-in as plaintiffs in the *Helton* class action.

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[1] In a companion order, entered pursuant to 28 U.S.C. § 1404(a), Judge Carnes transferred the claims filed by five non-Georgia plaintiffs to districts in Florida and North Carolina in which the named plaintiffs had been employed. *Bell v. K Mart Corp.*, 848 F. Supp. 996 (N.D. Ga. 1994).

In a ruling issued in consolidated appeals from these decisions, the Eleventh Circuit dismissed the appeal in *Grayson*, leaving undisturbed Judge Carnes' severance order, and affirmed in part and reversed in part Judge Shoob's class action ruling in *Helton*. *See Grayson v. K Mart Corp.*, 79 F.3d 1086 (11th Cir. 1996). The Eleventh Circuit affirmed the ruling allowing *Helton* to proceed as a class action, but restricted the temporal scope of the class to include only those persons who had been demoted or "removed" from Store Manager positions within 300 or 180 days of the "representative" charge filed by *Helton* plaintiff Charles Kempton on or about April 15, 1992. 79 F.3d at 1102-05. The Court of Appeals reversed Judge Shoob's ruling that had extended the temporal scope of the class to include all persons demoted within 180 or 300 days of the EEOC charge filed in 1991 by opt-in plaintiff David Grayson. In addition, the Court of Appeals ruled that Judge Shoob had erred in allowing the former *Grayson* plaintiffs and others demoted before the effective date of the Civil Rights Act of 1991 to file opt-in consents to join the *Helton* class after the applicable statute of limitations governing their claims had expired.[2]

The Eleventh Circuit limited the temporal scope of the *Helton* "opt-in" class action, but the case still includes

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[2] This ruling had the effect of dismissing from the case the opt-in claims of Mr. Grayson and each of his former co-plaintiffs in the *Grayson* lawsuit. As noted by the Court of Appeals, Judge Carnes had entered a conditional order allowing the *Grayson* plaintiffs to "refile" their separate lawsuits in the event they were not allowed to proceed as plaintiffs in the *Helton* case. 79 F.3d at 1095.

multiple, factually distinct demotion claims of persons demoted from Store Manager positions from as early as June 21, 1991[3] until the end of calendar year 1992. The demotions at issue occurred in 17 different states, the United States Virgin Islands, and Puerto Rico. K Mart submits, as argued in its Petition in Case No. 96-98, that the Eleventh Circuit erred in allowing multiple, disparate treatment claims to be litigated in an ADEA class action. However, it does not follow that the Eleventh Circuit's temporal scope ruling also should be reviewed on certiorari and vacated.

2. Statement of Facts

The essential facts showing why K Mart submits that Judge Shoob and the Court of Appeals erred in allowing this action to proceed as a class action are stated at pp. 5-10 of the Petition for Writ of Certiorari in Case No. 96-98. The additional facts summarized herein are relevant to the "temporal scope" issue raised by Respondents/Cross-Petitioners and relate to the timing of the demotion decisions at issue and the filing of the administrative charges underlying the plaintiffs' claims.

K Mart operates on a fiscal year basis, which ends on the last Thursday in January of each year. At that time, K Mart prepares operational reports and related documents summarizing the annual results of the fiscal year operations of each store. In addition, K Mart District Managers, who are assigned supervisory responsibility

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[3] This date is 300 days before the "representative" charge filed by *Helton* plaintiff Kempton on April 15, 1992.

for approximately 10-15 stores in a particular geographic district, prepare annual evaluations rating the performance of the managers in those stores. These evaluations are then reviewed by "subregion" managers and ultimately by the Vice President of the Southern Region. Poor store operating results, coupled with poor annual appraisals and other negative reviews of store operations lead to adverse personnel actions against the responsible Store Managers.[4] Thus, most of the demotion decisions at issue were made after the close of K Mart's fiscal year and in the late winter or spring of the calendar year.

All eleven of the *Grayson* plaintiffs were demoted in early 1991, based in large part on negative operational reports and evaluations prepared during and shortly after the end of the preceding fiscal year. However, unlike the *Grayson* plaintiffs, three of the five named plaintiffs in *Helton* were demoted during calendar year 1992, based on substandard performance during the 1991 fiscal year. Of these five plaintiffs, plaintiff Kempton filed the first timely charge that even arguably gave "adequate notice to the EEOC of the scope of the class alleging discrimination." 79 F.3d at 1105. The Kempton charge, which alleged, *inter alia*, that "[w]ithin the last year, at least

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[4] Respondents/Cross-Petitioners mischaracterize the operational reports, evaluations, store visit reports, and annual audits at issue as efforts to "build a case" or otherwise create a paper trail documenting pretextual reasons to terminate older managers. As pointed out in Kmart's initial petition in Case No. 96-98 at pp. 8-9, the facts do not support plaintiffs' theory. No evidence shows that any of the evaluations, ratings or operational reports in plaintiffs' files have been falsified or created for the purpose of "getting rid of" older managers.

fifteen (15) other Store Managers, all over age 40, had been demoted", was filed on April 15, 1992. *Id.* at 1170. K Mart submits that this charge did not adequately apprise the EEOC or K Mart of the proposition that plaintiff Kempton (or any other charging party) sought to pursue a "class-wide" claim of age bias based on demotions during a three-year period throughout the entire Southern Region.

It is undisputed that the EEOC did not conduct any class-wide investigation or "conciliation" of plaintiff Kempton's charge or any other charge at issue in this case. Rather, the only "determination" issued by the EEOC, which addressed the charge filed by *Helton* plaintiff Bob Williams, concluded that there was "no cause" to believe that Williams had been the victim of age bias. Moreover, because plaintiff Williams was advised that he would be demoted more than 180 days before he filed his charge with the EEOC, his ADEA claim is time barred. *See, e.g., Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989); *Delaware State College v. Ricks*, 449 U.S. 250 (1980). Thus, while K Mart submits that the Court of Appeals erred in allowing the Kempton charge to be the basis for "piggybacking," the Kempton charge was the "first timely filed charge of a *named plaintiff*" that could be used to measure the temporal scope of the class. 79 F.3d at 1102 (emphasis in original).

REASONS FOR DENYING THE CONDITIONAL CROSS-PETITION

1. The Eleventh Circuit's Decision Limiting The Appropriate Temporal Scope Of The Opt-In Class Does Not Present Issues Warranting Review By This Court

K Mart has argued, as its third reason for granting a writ of certiorari, that the Eleventh Circuit erred in applying the "piggybacking" concept, also known as the "single filing" rule, to allow persons to "opt-in" as plaintiffs in the *Helton* class without having filed individual charges of age bias. Whatever the efficacy of the "piggybacking" concept in cases involving "continuing violations" based on application of a discrete, discriminatory policy, *see, e.g., Allen v. Amalgamated Transit Union Local 788*, 554 F.2d 876 (8th Cir.), *cert denied*, 434 U.S. 891 (1977), K Mart respectfully submits that "piggybacking" should not be allowed in a case involving a series of individual, disparate treatment claims. *See Thomure v. Phillips Furniture Co.*, 30 F.3d 1020 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 1255 (1995).

K Mart also submits that piggybacking is not appropriate absent the filing of a true, "class-wide" charge which in fact had caused the EEOC to conduct a "pattern and practice" investigation, leading to conciliation of the class-wide plaintiffs' claims. There was no class-wide investigation or conciliation of any of the charges underlying this case. A non-specific reference to the alleged demotions of 15 other, older managers, without more, should not satisfy the need for a broadly based, class-wide charge as a prerequisite to an ADEA class action case.

Respondents/Cross-Petitioners have opposed K Mart's Petition for Writ of Certiorari arguing, *inter alia*, that application in an ADEA case of the "piggybacking rule is not controversial." However, in support of their own Conditional Cross-Petition for Writ of Certiorari, respondents/cross-petitioners argue that there is a split between the circuits on the piggybacking question. They contend that the Eleventh Circuit's decision limiting the temporal scope of the opt-in class cannot be "reconciled" with the rulings of other circuits, including the ruling in *Tolliver v. Xerox Corp.*, 918 F.2d 1052 (2d Cir. 1990), *cert. denied*, 499 U.S. 983 (1991), and that the split of authority has been "deepened" by a recent decision of the United States Court of Appeals for the Third Circuit rejecting the *Tolliver* court's analysis. *See, e.g., Whalen v. W.R. Grace & Co.*, 56 F.3d 504, 506-07 (3d Cir. 1995).

K Mart respectfully submits that these arguments confirm that there are significant uncertainties concerning applicability of the "piggybacking" concept that should be resolved on certiorari, as argued in section 3 of K Mart's original petition.[5] However, it does not follow that this Court also should review the Eleventh Circuit's ruling that the temporal scope of the class should be

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[5] For instance, in *Tolliver*, the court cites at least two and possibly three lines of authority applying the "piggybacking" concept. The outcome in these cases depends in part on whether the class is "of modest size" or consists of a "large group" of victims of alleged bias. 918 F.2d at 1058-59. K Mart respectfully submits that any class referenced in the Kempton charge is modest at best and does not warrant expansion of the case to include demotions in seventeen different states, Puerto Rico and the Virgin Islands.

measured by an EEOC charge filed by one of the named plaintiffs in *Helton* and not by the time-barred claim of opt-in plaintiff Grayson.

Plaintiffs argue that the Eleventh Circuit's ruling creates a split between the circuits because the court below refused to allow potential opt-in plaintiffs to "piggyback" on a charge filed by another, opt-in plaintiff who was not a named plaintiff in the *Helton* case. While K Mart asserted this proposition in the court below, suggesting that such an approach would allow the scope of an ADEA class to be extended backwards in time indefinitely, the Court of Appeals did not actually decide this issue. To the contrary, the Court of Appeals recognized that in limited circumstances, some other courts had allowed "the charge of someone other than a named plaintiff [in] the class action . . . [to] serve as the underlying . . . charge on which a putative plaintiff can piggyback." 79 F.3d at 1103. Thus, rather than rejecting the *Tolliver* court's analysis, which the court did not even cite,[6] the Eleventh Circuit

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[6] Respondents/Cross-Petitioners' reliance on *Tolliver* is misplaced given the procedural history of that case, which arose out of the "decertification" of an ADEA class by a district court in New Jersey. *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987), *rev'd in part on other grounds sub nom, Lusardi v. Lechner*, 855 F.2d 1062 (3d Cir. 1988), *adhered to on remand*, 122 F.R.D. 463 (D.N.J.), *app. dismissed*, 975 F.2d 964 (3d Cir. 1992). The plaintiffs in *Tolliver* had filed opt-in consents to join the *Lusardi* class; however, their opt-in claims were dismissed when the class was "decertified." The Second Circuit ruled that the opt-in claimants dismissed from *Lusardi* could file separate lawsuits to assert their individual claims even though they had not filed charges of age bias with the EEOC. *See* 918 F.2d at 1054 ("[T]he claims filed by the named plaintiffs in [*Lusardi*] suffice to permit the

based its decision on the unique characteristics of Mr. Grayson's individual charge, which it concluded was "particularly inadequate as a representative charge." 79 F.3d at 1104.

First, the court noted that opt-in plaintiff Grayson had been demoted on April 9, 1991, but had not filed his "consent" to join the *Helton* class until more than three years later, on September 19, 1994. As a result, the court held that Grayson was "time barred" from participating in the *Helton* class and that his time barred charge could not "serve as the representative charge for others" in that case. *Id.* This ruling is fully consistent with *Tolliver*, in which the Second Circuit noted that the piggybacking concept allows "the timely filing of an administrative charge *by a named plaintiff* in a class action [to] satisf[y] the charge filing obligation of all members of the class." 918 F.2d at 1056 (emphasis added).

In addition, the Eleventh Circuit held that the allegations of Grayson's charge gave notice of demotions that had occurred prior to the filing of that charge on June 14, 1991, but that it did not "put the EEOC on notice of demotions occurring" afterwards. 79 F.3d at 1104. Thus, the court concluded that Judge Shoob had erred in selecting the Grayson charge as the "representative charge" and that he should have chosen instead the "first timely filed charge of one of the named plaintiffs that gives adequate notice of the scope of the class." *Id.* at 1104-05.

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individual suits to go forward . . . "). Thus, the *Tolliver* action is procedurally distinguishable from this proceeding.

K Mart respectfully submits that this Court should review and decide the question of whether or not piggybacking should be allowed in an ADEA case, thereby clarifying considerable uncertainty about this issue. However, even if piggybacking were appropriate in this or any other ADEA case, which is a proposition that K Mart vigorously contests, then the Court of Appeals' ruling requiring the applicable, "representative" charge to be a timely charge filed by a *named* plaintiff is not an issue that should be reviewed on certiorari.

2. The Eleventh Circuit's Decision Regarding The Time Of Commencement Of An Opt-In Claim Does Not Warrant Review By This Court

As noted above, the appellate court's decision to reverse Judge Shoob's "selection" of the Grayson charge as a basis for piggybacking was based in part upon its ruling that Grayson's opt-in claim should be dismissed from the case as time barred by the longest, applicable three-year statute of limitations in effect at the time of his demotion. The three-year statute at issue, which is included in 29 U.S.C. § 255, was deleted from the ADEA effective November 21, 1991 by the Civil Rights Act of 1991. *See* 29 U.S.C. § 626(e) (Supp. V 1993). There is no dispute that this amendment is not retroactive. *See Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994). Nevertheless, respondents/cross-petitioners argue that the Eleventh Circuit erred in applying the statute of limitations to bar opt-in claims filed by persons demoted before November 21, 1991 who did not join the *Helton* case by filing "consents" within three years. Respondents/Cross-Petitioners contend that the Eleventh Circuit's decision conflicts with

the ruling in *Sperling v. Hoffmann-La Roche, Inc.*, 24 F.3d 463 (3d Cir. 1994), thereby warranting review on certiorari.

In *Sperling*, the Court of Appeals for the Third Circuit relied upon authority in Title VII class actions, concluding in effect that because the ADEA shares many similarities with Title VII, the statute of limitations for opt-in plaintiffs should be tolled by the filing of the original class action complaint and not by the filing of the "consents" themselves, as required by 29 U.S.C. § 256 (1994). As ruled by the Eleventh Circuit, however, the *Sperling* court's decision to "borrow" tolling concepts from Title VII, in which class actions are governed by Fed.R.Civ.P. 23, would be inconsistent with the proposition accepted by the Eleventh Circuit, that ADEA class actions are based solely and exclusively upon the FLSA and are not subject to the requirements of "commonality" and "typicality" incorporated in Rule 23.[7] Adopting Rule 23 concepts for tolling the period of limitations would be inconsistent with the Eleventh Circuit's ruling (which K Mart submits is erroneous) that the "similarly situated" standard in § 216(b) is "more elastic and less stringent" than the joinder and severance requirements in Rules 20

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[7] Other courts have applied Rule 23 standards in limiting the scope of an ADEA class. *See, e.g., Gorence v. Eagle Food Ctrs., Inc.*, No. 93-C-4862, 1994 WL 445149 *6 (N.D. Ill. Aug. 16, 1994) ("[m]any courts and commentators have used the vernacular of the Rule 23 class action for simplification and ease of understanding when discussing representative cases brought pursuant to the FLSA or ADEA, despite their distinct procedures for instituting class actions.").

and 42 and not as "involved" as the class action standards applied under Rule 23.[8] 79 F.3d at 1095.

Respondents' cross-petition for writ of certiorari on the "tolling" issue again highlights the reasons why K Mart's petition should be granted. However, if, contrary to what K Mart submits is the weight of authority, an ADEA class action may be allowed to proceed relying solely upon the "similarly situated" language of the FLSA, to the exclusion of the other procedural safeguards that historically have limited class action litigation, then it follows that the provisions of the FLSA governing the commencement of the opt-in case also should be applied.

The FLSA tolling rule is a matter of statute, incorporated expressly in 29 U.S.C. § 256 (1994).[9] The plain

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[8] As argued at pp. 14-15 of K Mart's Petition in Case No. 96-98, the opt-in provisions of the FLSA are a form of joinder device that was borrowed by Congress from the "spurious" class action provisions of former Rule 23(a)(3). If anything, the "spurious" class action is a narrower form of class action than the "true," representative class action allowed by the current version of Rule 23. Consistent with this Court's ruling in *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147 (1982), courts have consistently and repeatedly refused to allow class actions to proceed when individual, fact-specific issues predominate over true, class-wide claims. *See, e.g.*, cases cited at pp. 13-16 of K Mart's Petition in Case No. 96-98.

[9] This statute provides that in determining the applicable period of limitations, an action under the FLSA is commenced

> when the complaint is filed; except that in the case of a collective or class action instituted under the Fair Labor Standards Act of 1938, as amended . . . it shall

language of this statute governs the tolling of the period of limitations for FLSA class actions and should likewise govern the period of limitations with respect to those ADEA claims that accrued before the effective date of the Civil Rights Act of 1991. Thus, any ruling addressing the "tolling" question could only affect class action lawsuits filed on or before November 21, 1994 involving claims based on pre-amendment acts. Any class action based on claims that arose before November 21, 1991 and filed after November 21, 1994 would be time barred by the pre-Civil Rights Act of 1991 statute of limitations. Thus, the tolling issue raised in the cross-petition for writ of certiorari is not a matter of sufficient importance to warrant review in this case.

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be considered to be commenced in the case of any individual claimant –

(a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date . . . ; or

(b) if such written consent was not so filed or if his name did not so appear – *on the subsequent date on which such written consent is filed in the court in which the action was commenced.*

29 U.S.C. § 256 (1994) (emphasis added). This statute clearly supplants the provisions of Fed.R.Civ.P. 3 (otherwise applicable to Title VII class actions) which provide that "[a] civil action is commenced by filing a complaint with the court." *Cf. Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 (1980).

CONCLUSION

For the reasons stated hereinabove and in K Mart's Petition for Writ of Certiorari in Case No. 96-98, this case presents matters of sufficient uncertainty and importance in relation to the procedures for ADEA class action litigation that the questions raised by K Mart in its petition should be reviewed on certiorari. The "conditional" cross-petition filed by respondents highlights the reasons why K Mart's petition in Case No. 96-98 should be granted. However, K Mart respectfully submits that the questions presented by respondents/cross-petitioners regarding the temporal scope of the class do not warrant review by this Court.

Respectfully submitted,

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